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FROM: O. R. Barresi

DATE: October 27, 1978

SUBJECT: RECENT OSHA DEVELOPMENTS

Benzene Standard

You will note from the attached article that the proposed benzene standard has been struck down by the 5th U.S. Circuit Court of Appeals. There are a number of courses of action open if OSHA intends to challenge the appeals court: 1) a petition for rehearing, 2) appeal to the Supreme Court, or 3) rewriting the benzene standard. If it elects the appeal process, it will probably be March before the Supreme Court could consider it and even then the case could not be brought up before its next term, probably in October 1979.

OSHA Walkaround Pay Policy

A U.S. District Court decision recently upheld the OSHA pay policy for walkaround inspections. The proposed OSHA policy appeared in the September 20, 1977 Federal Register and became effective on that date. The policy was immediately challenged by the U.S. Chamber of Commerce. It appears this recent ruling is not final and will be appealed by the U.S. Chamber of Commerce.

OR Barresi

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attachments

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Current Report

Lead

OSHA REQUESTS PUBLIC COMMENT ON MEDICAL REMOVAL PROTECTION

The hearing record for the proposed standard for workplace exposure to lead was reopened September 16 by the Occupational Safety and Health Administration to receive comments on appropriate protections for workers transferred or removed from lead exposure under the proposed standard's medical surveillance provisions.

OSHA is requesting written comments on the issue by October 17 and has scheduled a public hearing beginning November 1 in Washington, D.C., to hear testimony on this issue, which the agency is referring to as "medical removal protection."

The agency said that one of the issues involved in the proceeding to develop a lead standard is whether, and to what extent, the standard should require employers to protect employees who submit to medical surveillance and as a result are removed from lead exposures to preserve the employees' health (Current Report, June 30, p. 142).

A provision in OSHA's proposed lead standard would extend employment protection to employees who participate in the medical surveillance program and are removed or transferred from their job because of occupational lead illness. This provision is the basis for OSHA's request for additional public comment.

Assistant Labor Secretary Eula Bingham said OSHA seeks to develop a medical surveillance provision that would "afford significant employee protection from serious health hazards without a consequential loss for the exposed worker."

OSHA explained that it does not favor transfer or removal of workers as an alternative to controlling the level of a toxic substance in the workplace. But, the agency said, it appears transfer or removal might be necessary occasionally to protect workers from impairment of health.

According to OSHA, the present practice of many employers is to remove workers from exposure to lead when specific blood lead levels are reached. OSHA said that in these cases appropriate protections are not always afforded the worker.

Rate Retention Advisory Committee

The issue of appropriate employment protection, previously referred to as "rate retention," came up when OSHA was considering its standard for exposure to coke oven emissions. When then-Assistant Labor Secretary Morton Corn announced the issuance of that standard in October 1976, he said that OSHA would explore the question of rate retention "in greater depth" (Current Report, October 28, 1976, p. 619).

Corn explained that OSHA would address rate retention as a separate issue and not in connection with the coke oven emissions standard because the demand for rate retention would apply to all of OSHA's health standards. Rate retention could be handled more easily without considering the issue each time a health standard was proposed, he said.

Last March, Joanne Goodell, of OSHA's committee management office, told OSHR that the agency was developing a charter for an advisory committee on rate retention and that it would take three to six months before such a committee would be appointed (Current Report, March 10, p. 1283).

When asked by OSHR if the reopening of the hearing record for lead to hear testimony on this issue signaled an end to the planned rate retention advisory committee, a staff member in OSHA's committee management office said the Office of Management and Budget's effort to eliminate federal advisory committees means that OSHA is permitted only one ad hoc advisory committee at a time (Current Report, September 1, p. 423).

Currently OSHA has an ad hoc Standards Advisory Committee on Cutaneous Hazards, which must accomplish its work within 180 days after its organizational meeting (Current Report, August 18, p. 371).

The OSHA committee management staff member did not say that the reopening of the hearing record means there will not be a rate retention advisory committee. He explained that such an advisory committee is now "in limbo" because "it got caught in the OMB review of advisory committees."

OSHA's public information officer, James Foster, said that reopening the hearing record does not indicate a change in OSHA's policy that the issue will be handled separately and not as a part of any particular health standard. OSHA only had decided to consider the issue of medical removal protection in conjunction with the lead standard, Foster said.

Comments Requested

OSHA's request for comments asked that information be submitted concerning the necessity for removal provisions, the medical criteria for limitations on exposure, the relationship between awards to the removed worker under workers' compensation and payments under medical surveillance provisions, and other issues.

OSHA also requested comment on the impact of the provision, including its effect on small businesses, collective bargaining, workers' health, workers' compensation laws, and the economy.

All comments for the record are due October 17 and must be submitted in quadruplicate to the Docket Officer, Docket H-004, Room S6212, Department of Labor, 200 Constitution Ave., N.W., Washington, D.C. 20210.

The informal public hearing is scheduled to begin at 9:30 a.m. on November 1 in the Department of Labor Auditorium. All persons wishing to participate in the hearing must file a notice of intention to appear with Clarence Page, OSHA Division of Consumer Affairs, Docket H-004, Room N3635, Department of Labor.

The text of OSHA's notice announcing the reopening of the hearing record (42 FR 46547) appears in the Full Text section of this Current Report.

General Policy

OSHA ANNOUNCES AMENDMENT TO RULES PROVIDING FOR WALKAROUND INSPECTION PAY

The Occupational Safety and Health Administration September 20 amended regulations to reflect a new OSHA policy that employees should be paid by their employers for time spent accompanying an inspector on a walkaround inspection.

The change to 29 CFR 1977.21, published in the Federal Register (42 FR 47344), came six weeks after Assistant Secretary of Labor Eula Bingham announced the new policy in a speech to a union convention (Current Report, August 18, p. 369).

Failure to compensate employees who participate in walkaround inspections "constitutes discriminatory action" and OSHA will "take to court" cases where it believes employers are discriminating against employees for exercising their rights under the Occupational Safety and Health Act, the announcement said.

The new policy also applies to inspection-related activities involving employees, such as responding to an inspector's questions or participating in opening and closing conferences, OSHA said.

Citing "wide publicity" given to the change announced in Bingham's August 10 speech, OSHA said the effective date for the amendment would be August 10 except for employers who were unaware of the interpretation at that time. For them, the effective date would be September 20, the date of the Federal Register notice.

Denial of employee pay in connection with OSHA inspections has a twofold effect, according to the agency. "It is inherently destructive of the employees' right to participate in the walkaround and, consequently, impedes the free flow of information between employees and representatives of the Secretary which is so critical to effective enforcement of the Act," OSHA said.

The agency also cited in the notice Supreme Court rulings concerning employer conduct which was "inherently destructive" of employee rights under the National Labor Relations Act and added, "The failure to pay for walkaround participation is conduct which is 'inherently destructive' of employee rights under the Occupational Safety and Health Act."

In addition, management representatives often are paid for their time accompanying the inspector, so that failure to give the same treatment to the employee representative would be additional ground for a finding of discriminatory conduct under Section 11(c) of the Act, the notice said.

Finally, the notice stated, it is currently the Labor Department's interpretation that time spent by employees on the walkaround inspection constitutes "work time" or "hours worked" under the Fair Labor Standards Act.

Court Rulings

In 1975 the U.S. Court of Appeals for the District of Columbia decided in *Leone v. Mobile Oil Corporation* (3 OSHC 1715) that the OSH Act does not require an employer to pay an employee for time spent in accompanying OSHA inspectors in a walkaround inspection.

However, an OSHA spokesman said past cases have not decided the question of discrimination against employees' rights. He added that the agency's present interpretation is that workers have the right to be paid.

Christine Waisanen, an attorney for the U.S. Chamber of Commerce, said a legal challenge to the new policy was a "possibility" but added that 95 percent of employers already pay their workers who go on the inspections.

Waisanen said, however, she has received complaints from employers angry that the change was announced by Bingham in a speech rather than as an advance notice of proposed rulemaking with opportunity for comment. "She (Bingham) ruffled a few feathers and made it seem to employers that their comments would not be listened to, that their minds had been made up anyway," Waisanen said.

The notice on walkaround pay disputes appears in the Full Text section of the Current Report.

Health Hazards

NIOSH RECOMMENDS LOWERING OF CEILING LIMIT FOR ETHYLENE OXIDE

Worker exposure to ethylene oxide should be limited to a ceiling concentration no greater than 135 milligrams per cubic meter determined during a 15-minute sampling period, the National Institute for Occupational Safety and Health recommended September 9.

The recommendations were included in a "Special Occupational Hazard Review and Control Recommendations for the Use of Ethylene Oxide as a Sterilant in Medical Facilities." In a letter transmitting the recommendations to the Labor Department, NIOSH Director John F. Finklea noted that the institute is calling for more stringent control of the substance than suggested earlier in a draft technical standard submitted to DOL under the Standards Completion Project.

The special occupational hazard review on ethylene oxide is the second of four prototype reports to be completed by NIOSH. The first, concerning nickel carbonyl, was issued in May 1977 (Current Report, June 2, p. 4). The purpose of the special reports, Finklea said, is to identify and evaluate hazards associated with ethylene oxide use in medical facilities and to suggest control measures for increased worker protection, including medical surveillance, sanitation practices, employee notification, sampling, and other practices.

The recommendations also include provisions for limiting ethylene oxide exposure to a time-weighted-average concentration of 90 milligrams per cubic meter (50 parts per million) for a workday.

Finklea told the Labor Department that further assessment of other ethylene oxide applications will be addressed in a criteria document on exposure to epoxides to be prepared by NIOSH in fiscal 1980.

The NIOSH recommendations are based in part on results of tests conducted by the institute which showed that hospital workers may be exposed to levels of ethylene oxide 10 times the limit mandated by the Occupational Safety and Health Administration (Current Report, June 9, p. 57).

Mine Safety

HOUSE, SENATE PASS DIFFERING BLACK LUNG BENEFITS REFORM BILLS

The House voted 283 to 100 on September 19 in favor of a black lung benefits reform bill, while the Senate approved its version of the reforms by voice vote on September 20.

The reform measures are intended to speed up the Federal Government's processing of compensation claims by coal miners who say they have pneumoconiosis, more commonly known as black lung disease, and to make it easier for coal miners to prove they are disabled by the disease.

The Senate finished debate on its bill (S 1538) on July 22, but postponed a final vote until after the House completed action on HR 4544. The House had to act first because tax provisions are included in the legislation. The black lung benefits bill is considered a tax bill because it would impose an excise tax on coal to pay for the benefits (Current Report, July 28, p. 274).

A conference committee will have to meet to resolve differences between the two versions of the reform bill.

Current Report

Litigation

BENZENE STANDARD STRUCK DOWN BY FIFTH CIRCUIT APPEALS COURT

The Occupational Safety and Health Administration's standard for employee exposure to benzene of one part benzene per million parts of air (one ppm) was struck down October 5 by the U. S. Court of Appeals for the Fifth Circuit.

The court's unanimous ruling in *American Petroleum Institute et al. v. OSHA* (Nos. 78-1253 et al.) also set aside the standard's dermal contact prohibition, thereby gutting the standard based on OSHA's determination that benzene is a carcinogen for which there is no known safe level of exposure.

Producers and users of benzene who petitioned the court to review the standard argued that OSHA failed to assess benefits expected to be achieved by the standard in light of the expected costs of compliance. The petitioners also asserted that the "reasonably necessary" language which appears in the Occupational Safety and Health Act's definition of a standard imposes a substantive obligation on the agency in issuing standards. The court's three-member panel agreed with both arguments.

If a standard is not "reasonably necessary" or appropriate to provide safe or healthful workplaces, it is not one that OSHA is authorized to enact, the court concluded. In addition, the Act "does not give OSHA the unbridled discretion to adopt standards designed to create absolutely risk-free workplaces regardless of cost," in the court's opinion. Although the agency does not have to conduct an elaborate cost-benefit analysis, it does have to determine whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard.

OSHA's conclusion that benefits derived from reducing the permissible benzene exposure limit from 10 ppm to one ppm "may be appreciable" was not supported by substantial evidence, the court held. Accordingly, "OSHA is unable to justify a finding that the benefits to be realized from the standard bear a reasonable relationship to its one-half billion dollar price tag," the court held. Until OSHA can provide substantial evidence that such a relationship exists, it cannot show that the standard is reasonably necessary to provide safe or healthful workplaces, the court added.

Dermal Contact

In throwing out the standard's provision prohibiting dermal contact with liquid benzene, the court noted OSHA's reliance on "old and inconclusive evidence that there is a possibility of absorption of benzene through the skin which might cause cancer." The agency's action "is in clear disregard of the congressional directive as to the kinds of evidence OSHA is required to consider," according to the court. The court noted that "unrefuted testimony reveals the existence of simple experimental techniques that can provide accurate information on the factual issues OSHA admits are unresolved by the past studies" which it relied upon in issuing the standard.

The reduction of the permissible exposure limit and the prohibition of dermal contact are the provisions of the benzene standard to which all the standard's other requirements are tied. Noting that it could uphold neither of these provisions, the court stated that the standard as a whole must be set aside.

Labeling

With regard to standard's labeling provisions, the court held that OSHA has the authority to prohibit an employer from removing the warning labels from containers of benzene and benzene products when those containers leave his workplace. Placing the responsibility to warn downstream employees of concealed hazards on those upstream employers who create the hazards and know of the hazards is within OSHA's broad authority to prescribe warning labels, in the court's opinion.

This decision, written by Circuit Judge Charles Clark, who was joined by Circuit Judges James P. Coleman and Gerald B. Tjoflat, will appear in a future Decisions supplement.

Litigation

COURT DISMISSES CHAMBER'S SUIT, UPHOLDS OSHA POLICY ON WALKAROUND PAY

The walkaround pay policy adopted by Assistant Secretary of Labor Eula Bingham concerning Occupational Safety and Health Administration inspections was upheld in a federal district court September 29.

The U.S. District Court for the District of Columbia dismissed a suit by the Chamber of Commerce of the U.S. over the new policy, which requires employers to compensate employees for time spent accompanying OSHA inspectors.

An opinion in *Chamber of Commerce v. OSHA* (No. 77-1842) was expected to be issued following the court's order on motions by both sides for summary judgment.

A spokesman at the National Chamber Litigation Center expressed "disappointment" at the decision and said it would be appealed. The chamber had argued in its brief that OSHA Administrator Bingham was trying to establish by fiat a policy which Congress had refused to legislate (Current Report, June 29, p. 105).

New Interpretation

Bingham announced several months after taking office that she was altering a 1972 interpretation of OSHA policy on pay for walkaround time. The new policy was published in the Federal Register September 20, 1977 (Current Report September 22, 1977, p. 499; text p. 519) and soon after challenged in court.

In its brief, OSHA argued that denial of walkaround pay was unlawful discrimination under Section 11 (c) of the OSH Act, which protects employees from retribution for exercising their rights.

One of those rights is employee participation in safety and health inspections, as provided in Section 8 (e), the OSHA brief continued. Participation by workers was described as one of the "essential ingredients in the expeditious and thorough discovery" of workplace hazards.

OSHA contended that "the interruption of wages, which would otherwise be earned by an employee who forgoes his walkaround rights, constitutes a clear and unmistakable example of adverse discriminatory action."

The ruling by Judge June L. Green denied chamber requests that the court issue a permanent injunction prohibiting enforcement actions by OSHA based on the policy and that it invalidate OSHA's interpretation that the Fair Labor Standards Act requires compensation for time spent on OSHA inspections.

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